THE AMERICAN LAW INSTITUTE'S RESTATEMENT OF THE LAW OF TRUSTS *

The publication of the Restatement of the Law of Trusts deserves more than a casual notice. Readers of the CANADIAN BAR REVIEW are already familiar with the details of the history and organization of the American Law Institute.[1] Briefly, the Institute was founded in 1923 for the purpose of clarifying and improving the American common law, which, fed by the courts of forty-nine jurisdictions, had become a huge and unwieldy body of judicial decisions. The vast number of reported cases had resulted in much confusion and uncertainty. Many thoughtful American lawyers feared that the present system of judicial precedent would break down under its own weight and in its place would be raised rigid statutory codifications of the common law. To meet this challenge to the common law, as we know it, the Institute was founded. Its immediate object has been to overcome the complexity of the law by presenting an orderly statement of the general common law of the United States. Progress towards this end has been made possible by the happy combination of ample funds supplied by the Carnegie Corporation, and, what is more important, the foremost minds in American legal scholarship recruited from the bench, the bar and the law schools.

The Committee responsible for the Restatement of the Law of Trusts had among its members such well known names in this field as Austin W. Scott, as Reporter, George C. Bogert and George P. Costigan, Jr. Professor Scott through his teaching, his case books and numerous articles in legal periodicals has become an acknowledged authority on Trusts.

The scheme of this Restatement follows that of its predecessors. The principles or propositions, in the form of positive statements of the law are printed in heavy block letters in consecutively numbered sections. After each section appears one or more Comments, which elucidate the principle and, where apposite, the reader is referred to other sections in this or other Restatements. Following the Comments are Illustrations which

* *Restatement of the Law of Trusts, as adopted and Promulgated by the American Law Institute at Washington, D.C., May 11, 1935.* St. Paul: American Law Institute Publishers. 1935, 2 Volumes. Pp. xxxii, 808; xxiv, 809-1496.

[The present article was written as a book review, but in view of the importance of the Institute's undertaking and the unfamiliarity of the Canadian profession with that work, it is reproduced in this place.—ED.]

[1] See Yntema, *The American Law Institute* (1934), 12 Can. Bar. Rev. 319.

demonstrate various applications of the principle. These Illustrations are usually hypothetical cases but some may be recognized as the simplified statement of the facts of actual decisions. No reported cases are cited. This to a Canadian lawyer is perhaps the most striking feature of the Restatement. However, it must be remembered that the very object of uniformity and simplicity would have been defeated by the citation of cases. To have selected or excluded particular decisions would have betrayed those differences and lacuna which the Institute hopes to banish from the law. Presumably the Restatement is founded upon the reported decisions of the courts, and presents, not the Institute's idea of what the law should be, but an orderly and scientific statement of the law as the Institute thinks it is. This has been accomplished by the process, extending over many years (in the case of the Trusts Restatement since 1927) of selection, rejection, debate and compromise where conflict in the case law exists. The authority of the Restatement upon any particular subject therefore rests in large measure upon the reputations of the individual members of the Committee charged with the preparation of it. In this respect, the Restatement of Trusts has been richly endowed.

In stating merely the existing law, the Institute has abandoned, or perhaps merely postponed, its intention to improve, as well as clarify the law. There is no doubt that before the law in any particular instance can be improved by either intelligent legistive action or enlightened decisions of the courts, it is necessary to determine what the law actually is. The original scheme of the Institute contemplates the publication of exhaustive treatises supplementing the Restatements with critical analysis of the case law upon the particular subject. This also has been abandoned, but since the appearance of the Restatements of Contracts, Conflicts of Laws, and Trusts, Williston, Beale and Bogert have published monumental texts on those subjects. Also there are in the course of preparation by the State Bar Associations, with the blessing of the Institute, state annotations of the Restatements. These recent texts, the authors of which were closely connected with the Institute, and the state annotations, when they appear, however helpful they may be to the practitioner, can not but perpetuate and accentuate the very inconsistencies the Institute hopes to obliterate. They may thus defeat the object of the Institute which would be accomplished "in so far as the legal profession accepts the Restatement as prima facie a correct restatement of the general law of the United States." (Vol. 1, p. ix).

The preparation of the Restatements has involved a complete and scientific re-examination of the basis of many principles of law. Also to the credit of the Institute must be placed the permanent enrichment of American legal periodical literature by the incisive attacks on the Restatements and the spirited answers by its defenders.[1A] It would perhaps be presumptuous in a Canadian lawyer to evaluate the Restatement in relation to American law, but one can at least say that the experience gained in its preparation and its acceptance or rejection by the profession will prove invaluable when in future any serious consideration is given to statutory codification of the common law. Also, in so far as the Restatements accurately state the existing law, they provide an essential foundation for any legislative amendments.

The benefits the Canadian or English lawyer can derive from the Restatement are perhaps indirect, but nevertheless real. For the present we do not suffer from confusion of case law, similar to that existing in the United States, although perhaps our common law lacks the solidarity which obtains in the country of a single judicial jurisdiction, such as England. Nor have we yet to consider any wide spread demand for codification of our common law. Such piecemeal codes as the Sale of Goods Act, the Bills of Exchange Act and the Criminal Code appear to satisfy our immediate needs. Uniformity in our provincial legislation is proceeding with due restraint through the activities of the Commissioners on the Uniformity of Legislation. Nevertheless, if we are in the future confronted with the problem of casting our common law into a more clearly defined mould, we will have the invaluable advantage of the present American experiment to guide us. The Restatements will be of immediate value in two ways. In the first place they will be excellent material for students of that nebulous branch of jurisprudence —comparative law. Secondly, the appearance of the Restatement on any subject, being a refreshingly dogmatic statement of the existing law, provides an opportunity for, and should stimulate a re-examination and an appraisal of our law on that subject.

There is no Canadian text book on the law of trusts. (By the term the Canadian law of trusts, I do not include the Quebec law on trusts.) We follow the English cases, and use

[1A] See, for example, Goodrich, *Institute Bards and Yale Reviewers* (1936), 84 U. of Pa. L.R. 449; Arnold, *Institute Priests and Yale Observers* (1936), 84 U. of Pa. L.R. 811; Arnold, *Restatement of the Law of Trusts* (1931), 31 Col. L.R. 800; Scott, *Restatement of the Law of Trusts* (1921), 31 Col. L.R. 1206.

the leading English texts. With certain minor statutory differences, the English law of Trusts is the same as our own. The same can be said of the American law. Professor Scott in a recent article,[2] recalls that in Ames' first case book on this subject, English cases predominated. Those who have read the explanatory notes which accompanied the tentative drafts of the Trusts Restatement will recall the large number of English cases which were cited in support of the principles provisionally agreed upon by the Committee for submission to the Council of the Institute. In fact the Restatement of Trusts, with very few changes could be fairly labelled as a Restatement of the English or Ontario law of Trusts. There is little in the Restatement to shake the loyalty of those Canadian judges and lawyers who persist in regarding as anathema American texts and decisions.

Coming at last to the text of Restatement of Trusts itself, the first matter for comment is the omission of a full treatment of constructive trusts. This will appear in a later Restatement devoted to Restitution and Unjust Enrichment. At the threshhold we are thus compelled to consider definitions. The express trust is defined as "a fiduciary relationship with respect to property, subjecting the person by whom the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it," (sec. 2). A resulting trust arises "where a person makes or causes to be made a disposition of property under circumstances which raise an inference that he does not intend that the person taking or holding the property should have the beneficial interest," (sec. 404). Both these classes of trusts, so defined, depend upon intention. In contrast to these, a constructive trust is one that "is imposed not because of the intention of the parties but because the person holding title to the property would profit by a wrong or would be unjustly enriched if he were entitled to keep the property," (p. 1249). Every writer on trusts uses the terms "resulting" and "constructive" with his own connotations. These differences are not important as long as we know what type of trust is meant by the person using these terms. In the Restatement, express and resulting trusts mean modes of property disposition, and constructive trust means a remedial device imposed by the Courts. In spite of this clear cut distinction the Restatement has a lot to say about constructive trusts, especially where they arise out

[2] *Fifty Years of Trusts* (1936), 50 Harv. L.R. 60.

of express trusts and attempts to create express trusts—such as the effect of failure of oral trusts of land (secs. 44, 45), secret testamentary trusts (sec. 55), the liability of a transferee with notice of trust property (sec. 291), and the liability of a donnee of trust property (sec. 292). These constructive trusts are so intimately connected with express trusts that a fuller treatment might well have been accorded them in order to present a more complete picture of the express trust. The decision to include constructive trust as a remedial device in the later Restatement on Restitution will give the Institute wider scope in dealing with this difficult branch of law, but a certain amount of duplication here would not have been as regrettable as the many references to the later Restitution Restatement one now meets in the present volumes.

In a review of this nature, time and space preclude comment on every part of the field covered by the text. We will therefore restrict ourselves to a few topics in which the Restatement reveals some differences to and similarities with the English law of trusts.

(1) The subject of trusts arising out of powers of appointment, and "powers in trust", has long been one of difficulty in Anglo-American law. For us a comfortable degree of certainty has been achieved through the decisions in *Re Weekes' Settlement*,[3] *Re Combe*,[4] and *Re Mills*.[5] The rule as now settled in England, and therefore presumably in Ontario, is that in the case of a gift to A for life with a power to A to appoint among a class but no gift to the class and no gift over, no trust exists for the class in default of appointment unless it appears that A was, by the mandatory language used by the donor of the power, placed under a duty to exercise the power in favour of the class. Nor in such a case can it be said that there is an implied gift to the class. The present American rule is stated as follows: "Where a power is conferred upon a person to distribute property to or among the members of a definite class, a trust in favour of the members of the class is created if, but only if, the donor of the power manifests an intention to create such a trust," (sec. 27). This would appear to be also an accurate statement of the English law. However the Comments to sec. 27 show, in cases where there is no intention to create a trust, the freedom with which the American Courts will imply a gift to the class in default of appointment. For example, such a gift will be gener-

[3] [1897] 1 Ch. 289.
[4] [1925] Ch. 210.
[5] [1930] 1 Ch. 654.

ally implied, though not necessarily, from the very fact that the donor has conferred a power of appointment among a class (Comment c), or "where the members of the class are in such relation to the donor of the power that it would be natural for him to make provision for them" (Comment d). It is difficult to appreciate any distinction in result between a trust for a class or an implied gift to the class. In both cases the class shares the property equally in default of appointment. The advantage of the English rule in refusing to imply a gift where there is none in fact, makes for greater certainty in interpretation than that laid down by the Restatement, which permits consideration of matters extraneous to the instrument to be interpreted.

(2) The sections of the Restatement dealing with the formalities required by the Statute of Frauds in the creation of trusts of land are particularly interesting in view of the lack of principle shown by the English case law on this point. The Statute provides by sec. 7, "That declarations or creations of trusts or confidences of any lands, tenements or hereditaments shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust or by his last will in writing or else they shall be utterly void and of none effect." The difficulty is in the identification of the "party who is by law enabled to declare such trust". The language of the Statute itself does not assist one. Naturally a memorandum signed by one who is a stranger to the land will not satisfy the Statute. Some cases say that only the beneficial owner of the land at the time the trust is created can sign the memorandum, and not the person who has merely the legal estate.[6] On the other hand here is authority for the view that the statute is satisfied by an acknowledgment in writing by the trustee,[7] apparently on the ground that as an admission against the trustee's interest, it should be accepted as true. It is not always possible to reconcile these two views. In *Kronheim* v. *Johnson*, the trustee purported to declare the trust but as the trust so declared did not follow the instructions of the settlor, it was later set aside on the ground that the beneficial owner, the settlor, and not the trustee, was the only person who could sign the memorandum. The Restatement attempts to solve this problem in sections 41 and 42. Sec. 41 states that "Where the owner of an interest in land declares himself trustee of the

[6] *Tierney* v. *Wood* (1854), 19 Beav. 330; *Kronheim* v. *Johnson* (1877), 7 Ch. D. 60.

[7] *Gardner* v. *Rowe* (1825), 2 Sim. & St. 346; LEWIN, TRUSTS, 13th ed., p. 49.

interest the memorandum properly evidencing the trust is sufficient . . . . if it is signed by him (a) prior to or at the time of the declaration; or (b) subsequent to the time of the declaration but before he has transferred his interest." Here the beneficial owner and trustee being the same person the difficulty pointed out above does not arise. Sec. 42 states that where the owner transfers the land to another in trust, the memorandum is sufficient if signed by the transferor, before he parts with the land or by the transferee, the trustee, at any time prior to the transfer and before he himself has transferred the land. In other words the Restatement requires the memorandum to be signed by the apparent beneficial owner. The rule even so stated is not easy to apply. Take what must be a common instance of the creation of a trust of land. A agrees to purchase Blackacre from B. Upon the agreement being signed, A becomes the beneficial owner, B retaining the legal title as security for the payment of the purchase money. A then orally directs B to convey to A in trust for C. Is the deed executed by B alone sufficient to satisfy the statute? At that time B has no beneficial interest in the land, nor is he a trustee for C. As long as he is paid, it must be a matter of indifference to him whether or not he conveys the property upon any particular trust. Executing the deed is no admission against his interest and it would seem upon principle that such a deed does not constitute a valid memorandum. Yet it has been decided in *McConville* v. *Capital Trust*,[8] that a deed executed in such circumstances was sufficient compliance with the Statute, and there is no reason to believe that this decision would not be followed should the point arise again. The case law on this problem is meagre but nevertheless confusing, and any clarification can come only from the legislature.

(3) When faced with oral trusts of land, courts of equity have from time to time taken extraordinary liberties with the Statute of Frauds. It has been repeatedly said that the Statute will not prevent the proof of fraud. Constructive and resulting trusts are by the terms of the Statute excepted from its operation. Through this exception a formidable body of constructive trusts arising from the failure of oral trusts of land has developed. Where A conveys Blackacre to B upon trust for C, the Statute of Frauds is a bar to the enforcement of the express trust for C. However, the English and Ontario Courts while not enforcing the trust for C will impose a constructive trust upon B in A's

[8] (1925), 27 O.W.N. 368.

favour.[9] Even where A, the settlor, is also the beneficiary, B will be compelled to hold Blackacre for A although this is in effect the enforcement of the express oral trust.[10] In other words, a constructive trust will not be worked forward for the benefit of the third party, but will only be worked backwards to the settlor.[11] In no case will B be allowed to keep Blackacre. The constructive trust is imposed to prevent such unjust enrichment. In contrast to this, the American Courts though they refuse to enforce an express oral trust of land, will compel B to hold Blackacre upon a constructive trust for C or for A if he is the beneficiary, where B has obtained Blackacre through fraud, duress, undue influence or mistake, or where B was at the time of the transfer in a confidential relation to A (secs. 44 and 45) In these situations the express trust will in effect be enforced under the guise of a constructive trust. If B at the time of the transfer is not guilty of improper conduct and no confidential relationship exists, he is permitted to retain Blackacre. The fact that B has obtained a benefit in breach of his word does not apparently justify the imposition of a constructive trust. The American rule appears to be illogical in that it permits the enforcement of express trusts in the face of the Statute in those cases where the transferee never intends to carry out his undertaking and refuses any remedy, where the transferee at the time of the transfer is willing to perform the trust but later changes his mind. Our law based upon the prevention of unjust enrichment by the constructive trust seems preferable to the American solution, dependant as it is upon the state of the intended trustee's mind at the time of the transfer.

(4) The Wills Act is treated even more cavalierly than the Statute of Frauds by both the English and American Courts by their recognition of secret testamentary trusts. These are express oral trusts which cannot be enforced as such because they fail to conform to the requirements of the Wills Act. Here again the device used is the constructive trust. The will operates according to its terms, but the Courts of equity impose *de hors* the will a constructive trust upon the legatee to carry out his agreement with the testator. As Lord Westbury said in *McCormack* v. *Grogan*,[12] "The Court of Equity has from a very early period decided that even an Act of Parliament shall

[9] *Scheuerman* v. *Scheuerman* (1916), 52 Can. S.C.R. 625; *Fleming* v. *Royal Trust* (1920), 18 O.W.N. 386.
[10] *Davies* v. *Otty* (1865), 35 Beav. 208.
[11] Contra: *Langille* v. *Nass* (1917), 51 N.S.R. 429.
[12] (1869), L.R. 4 H.L. 82 at p. 97.

not be used as an instrument of fraud; and if in the machinery of perpretrating a fraud, an Act of Parliament intervenes, the Court of Equity, it is true, does not set aside the Act of Parliament, but it fastens on the individual who gets title under that Act, and imposes upon him a personal obligation because he applies the Act as an instrument for accomplishing a fraud. In this way the Court of Equity has dealt with the Statute of Frauds, and in the same manner also it deals with the Statute of Wills." Today it is not necessary that the legatee-trustee should be guilty of fraud before the secret trust can be upheld. An argument based on the contrary view failed in *Blackwell* v. *Blackwell.*[13] The only elements essential for the enforcement of such a trust are the intention to create it, the communication of this intention to the legatee trustee, and the agreement or acquiescence of the latter.[14] To refuse to work a trust forward here would cause greater hardship than in an inter vivos transaction where the settlor is living and the oral trust fails. In such case the settlor can recover the land and benefit his intended donee by some other means. This relief is, of course, not open to a testator. On the other hand it appears inconsistent to refuse, as the English courts do, to work a constructive trust forward where both the parties are alive and yet enforce a secret testamentary trust where one of the parties is dead and the danger of perjury and unconscionable conduct is greater. Also, the contrast between the insistence of the courts upon a strict observance of the Wills Act upon such matters as attestation and the freedom with which secret trusts are enforced illustrates the haphazard way this branch of our law has developed without any settled policy or logic. In the reviewer's opinion secret trusts should not be enforced. Where the legatee takes beneficially on the face of the will, he should be permitted to keep the property, and where it appears on the face of the will that the legatee is to hold the property for persons not named in the will, then the property should go to the residuary legatees or next of kin. However these trusts are well established in our jurisprudence, and any change in the law must come from the legislature.

(5) Professor Scott has pointed out recently a distinction between the English and American law of trusts.[15] The former considers primarily the interests of the beneficiaries, while the latter stresses the necessity of carrying out the in-

[13] [1929] A.C. 318.
[14] *Blackwell* v. *Blackwell, supra;* RESTATENEMT sec. 55.
[15] *Fifty Years of Trusts* (1936), 50 Harv. L.R. 50 at p. 60.

tention of the settlor. This he illustrates by the difference in the rules on two points—the spendthrift trust and the termination of trusts. In the United States a restraint against the voluntary or involuntary transfer of the trust income is permitted during the life of the person entitled to the income (sec. 152), except where he is the settlor (sec. 156), or where there is an enforceable claim against him either by his wife or children for support, for necessaries supplied to him or for services rendered and goods supplied which preserve his interest in the trust property (sec. 157). In other words with these exceptions, the beneficiary is permitted to enjoy a definite property interest which cannot be reached by his creditors. This respect for the intentions of the settlor which benefit the spendthrift at the expense of his creditors is reminiscent of the married woman's separate use and is difficult to justify on the broad ground of social expediency. In our law alienability is one of the incidents of property which can not be fettered by the will of the settlor. However the same protection can be given the spendthrift under our law by employing a conditional limitation for life or until alienation, with a discretionary trust for the spendthrift permitting the trustee to expend the income for the benefit of the spendthrift and his family, followed by gifts over.[16] The English Trustee Act of 1925 provides in sec. 33 a statutory recognition of these "protective trusts" and facilitates their creation by defining their incidents. All the conveyancer has to insert in the trust instrument is the clause "the income to be held upon a protective trust for A". Sec. 33 contains a limitation which an Ontario draftsman, for instance, could copy into his instrument with perfect confidence that income would not fall into the hands of beneficiaries' creditors. In result, although we acknowledge the rule against inalienability of property indefeasibly vested which the American courts disregard in upholding their spendthrift trusts, nevertheless the result to the unfortunate creditor is often the same. It is questionable whether such devices as the protective or spendthrift trust should be permitted.

(6) The second distinction is illustrated by the power accorded beneficiaries to terminate trusts in the face of a contrary direction by the settlor. The rule is well settled in England and Ontario that where all the actual or possible beneficiaries are in existence and sui juris, they may, acting together terminate the trust in whole or in part. An example of this

[16] *In re Bullock* (1891), 60 L.J. Ch. 341.

is the right of a legatee in whom a legacy is indefeasibly vested but which according to the terms of the trust is not to be paid to him, until he reaches, let us say, the age of thirty, to obtain the legacy as soon as he is of age.[17] In contrast to this the American rule is "if the continuance of the trust is necessary to carry out a material purpose of the trust, the beneficiaries can not compel its termination" (sec. 337). The "material purpose" may be the exclusion of a life tenant from the management of the property, or the preservation of the property for the benefit of those whom the settlor did not feel capable of preserving it themselves (pp. 1025-26). Also where property is indefeasibly vested in a beneficiary but by the terms of the trust he is not to receive it until he attains a certain age over twenty-one years, the beneficiary cannot terminate the trust before he reaches the specified age, the attainment of which is apparently deemed a "material purpose" (p. 1028). This indulgence of the wishes of the settlor raises the interesting problem of the application of the Perpetuity Rule which our regard for the right of the beneficiaries avoids.[18] This problem, however, is stated to be outside the scope of this Restatement (sec. 62, Comment k).

The development of the trust to its present state by the court of equity has been a distinctive achievement of Anglo-American law. The trust, in order to prevent unjust enrichment and to fulfil the intentions of settlors under changing conditions, has of necessity preserved its flexible character. However in so far as the trust creates and conserves interests in property a degree of certainty is essential. A comparison of our law with that of the United States, as set forth in the Restatement, will illustrate the conflict and adjustment of these elements of adaptability and rigidity. The Restatement has placed us under a great obligation to the American Law Institute—an obligation which might be repaid in part by a thorough re-examination on our part of the fundamental doctrines of trust law to insure their satisfaction of the demands the future will make upon them.

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[17] *Saunders* v. *Vautier* (1841), 4 Beav. 115.
[18] See 34 Mich. L.R. 553.